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AMERICAN BAR ASSOCIATION

**Standing Committee on  
Professional Discipline**

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Mark I. Harrison  
Chair, ABA Joint Commission on Evaluation of  
the Model Code of Judicial Conduct  
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Dear Mr. Harrison:

The ABA Standing Committee on Professional Discipline is pleased to submit its comments to the Joint Commission on Evaluation of the Model Code of Judicial Conduct's January 2005 proposed draft of Canon 5 of the Model Code.

Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court is a member of the Discipline Committee. She did not participate in the discussion of the Joint Commission's draft and abstained from voting on any of the proposals and changes suggested by the Discipline Committee.

Based upon the imperative language set forth in the Joint Commission's draft of Canon 5, it appears that the Joint Commission still intends for the Canons to have the same degree of enforceability as the Rules. However, at the SOC/CPR Joint Committee on Ethics and Professionalism meeting on February 12, 2005, there was an indication that the Joint Commission was leaning toward retaining the Canons but making clear that they are not intended to be enforceable. The Discipline Committee would support this approach. If the Joint Commission so decides, then the imperative language of all the Canons should be modified in a manner similar to the attached redlined and clean Discipline Committee drafts of the black letter of Canon 5. Nevertheless, the Discipline Committee still urges the Joint Commission to adopt a Model Rules format for the Code and to eliminate the Canons. This is the preferred approach from an enforcement perspective.

The Discipline Committee's comments regarding the January 2005 draft of Canon 5 are:

- As noted above, the Canon language should be changed from the imperative to neutral.
- The Discipline Committee commends the Joint Commission for its efforts to restructure Canon 5 so as to delineate between the different types of judicial election/selection methods. These distinctions, if appropriately crafted will assist judges in abiding by the Code. However, there are several instances where the Discipline Committee noted that the Joint Commission's attempts to clarify the former Canon could result in unintended confusion. For example, the Committee believes that the Joint Commission should strive to make less confusing the back and forth in the draft Rules between prohibited conduct and the various

enumerated exceptions to those prohibitions. In addition to those instances referenced in the comments below, the Committee suggests that the Joint Commission draft separate rules for judges in retention elections and judges participating in non-partisan elections (Rule 5.04).

- The Discipline Committee understands the decision of the Joint Commission to release for public comment the black letter provisions of Canon 5 prior to completion of the Commentary. However, it would have been helpful to have more information as to the Joint Commission's reasons for the proposed changes to the black letter.
- With respect to terminology, it is clear to the Committee that the Joint Commission intends for there to be a difference between a "gathering", "meeting" and "event." It is not clear, however, what those differences are. The Committee believes that those terms should be defined. Further, the Committee suggests that the Joint Commission define "leader" as set forth in Rules 5.01 (a) and 5.02(a).
- The title of Rule 5.01 should make clear that this Rule applies to sitting judges who are not currently running for office, as noted in the Joint Commission's memo regarding its proposed changes to Canon 5. The Committee proposes adding language to that effect as noted in its drafts.
- The Discipline Committee believes that in Rules 5.01 and 5.04 the use of the phrase "publicly speak in support of or against a political organization" clarifies the former language stating that a judge shall not "make speeches on behalf of a political organization." The phrase "on behalf of" could mean in favor of or against, but the new language is clearer. The Discipline Committee makes no comment as to what, if any, constitutional or other legal issues could arise as a result of this change.
- The Committee is concerned about the implications of the use of "directly or indirectly" to modify the prohibitions set forth in Rule 5.01. Does the use of "indirectly" impose upon the judge a duty to advise his or her staff, family members, domestic partner or spouse that they must abide by these provisions of the Code as well as a corresponding duty to ensure that these individuals comply?
- Rule 5.01 states that a sitting judge cannot act as a leader or hold an office in a political organization. This Rule does not and should not forbid a judge from being a member of such an organization, which under the Terminology Section includes a political party. That being the case, it makes little sense to allow judges to be members of political organizations while prohibiting them from participating in the activities of those entities. The prohibition seems overly broad and as noted above, the terms "meetings" and "events" are not defined for purposes of the Rule. For example, should the judge be prohibited from attending an awards dinner or open business meeting of such an organization?

- The intent of the Rule 5.01 appears to be to prohibit sitting judges from attending meetings, dinners or events that are sponsored by or to promote the election or defeat of a candidate for public office, whether those dinners, meetings or events are sponsored by a political organization or the candidate himself/herself. This rationale makes sense and the Committee recommends revising the language of Rule 5.01, Paragraphs (d) and (e) as suggested.
- The Discipline Committee recommends adding language to Rule 5.01 prohibiting a sitting judge from making false statements or misrepresentations regarding any candidate for public office. The Committee chose “misrepresentations” to replace “misleading” because that term is consistent with Rule 8.4 (c) of the ABA Model Rules of Professional Conduct and more readily definable in a disciplinary context. This prohibition should not be limited to those judges who are currently seeking election, retention or appointment to judicial office.
- The Discipline Committee’s proposed changes to the first sentence of Rule 5.02 and Paragraphs (b) (c), (e), (f) and (h) are editorial and intended to increase the user-friendliness of the Rule.
- The Discipline Committee’s proposed changes to Rule 5.02(d) are intended to be more inclusive in terms of the adjudicative duties of the judge.
- The Discipline Committee’s proposed changes to the titles of Rule 5.03 and 5.04 and to the first sentence of Rule 5.03 are intended to increase the clarity of the Rules.
- As noted above, the Discipline Committee recommends that the Joint Commission distinguish a “gathering” and a “meeting” or “event” for the purposes of Rules 5.03 and 5.04. The manner in which Rule 5.04 (a) (2) and (b) (2) interrelate is unclear in this context. If the Joint Commission intends that a “gathering” for purposes of Rule 5.04 must be “apolitical” then it should make this clear. Similarly, if, in Rule 5.03, “gathering” is not intended to have such a restriction, then the Joint Commission should clarify this as well. It seems to the Committee that Rule 5.03 could be read to mean that a judge covered by that Rule could speak to a “gathering” on his or her own behalf at a meeting or event sponsored by a political organization, but that a judge subject to Rule 5.04 could not do so.
- It appears that the intent of the prohibitions set forth in Rule 5.04 is to preclude a candidate in a non-partisan election or a retention candidate from endorsing or supporting a political organization or such an entity’s agenda/policies. The Committee is concerned, however, about a rule that would prohibit non-partisan election and retention candidates for judicial office from speaking to political organizations strictly about their qualifications for office.

- The Discipline Committee's proposed changes to Rule 5.06 are intended reflect the fact that in most jurisdictions regulations relating to campaign finance are set forth in statutes, as opposed to rules or codes of professional conduct. Other changes are intended to increase the clarity of the Rule.

The Discipline Committee appreciates the opportunity to comment on this proposed draft and looks forward to reviewing future drafts distributed for comment by the Joint Commission. If the Joint Commission has any questions regarding the Discipline Committee's submission, please contact Regulation Counsel Mary M. Devlin at 312/988-5311 or [devlinm@staff.abanet.org](mailto:devlinm@staff.abanet.org).

Sincerely,



Hon. Barbara K. Howe  
Chair, ABA Standing Committee on  
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enclosures

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